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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. A1350

RICHARD MURRAY KLEBS,

Petitioner,

-vs-

STATE OF INDIANA,

Respondent.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

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# BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

The opinion of the Court of Appeals of Indiana is reported in 305 N.E.2d 781.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

## QUESTION PRESENTED

Whether the decision of the Court of Appeals of Indiana that "Independent testimony regarding the amount of intoxicants consumed and the erratic driving culminating in the death of another was sufficient to prove the essential elements of the offense charged," deprived Petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States.

## CONSTITUTIONAL PROVISION INVOLVED

The pertinent provision of the Constitution of the United States is set forth in the Petition on page 3.

## STATUTORY PROVISIONS INVOLVED

Ind. Code 1971, 9-4-1-54 [Burns' Stat., §47-2001].

* * *

"(b) Operating or driving while under the influence of intoxicating liquor or narcotic or other drugs.

* * *

"(1) Any person who while under the influence of intoxicating liquor or unlawfully under the influence or other habit-forming or dangerous, depressant or stimulant drugs operates or drives a vehicle and when so operating or driving causes the death of another person, is guilty of a felony and, upon conviction, shall be imprisoned for an indeterminate period of not less than one year nor more than five years; or shall be imprisoned

for an indeterminate period of nos less than one year nor more than two years to which shall be added a fine of not less than two hundred fifty dollars nor more than five thousand dollars.

"*  *  *"

Ind. Code 1971, 9-4-4.5-2 Burns' Stat., 47-2003d given by Petitioner on page 4 of his Petition as the statutory provision involved is not involved herein because of the fact that its application is expressly limited to the Implied Consent Law (IC 9-4-4.5-1——9-4-4.5-6).

## STATEMENT OF THE CASE

The Petitioner was convicted in the Superior Court of Lake County of the charge of Causing Death While Driving Under the Influence of Intoxicating Liquor (IC 9-4-1-54

[Burns' Stat., §47-2001] on March 8, 1973.

The evidence against him consisted of a Breatholyzer test showing his blood-alcohol content to be .19 by weight, (Tr. pp. 142-160, 55) the testimony of Norma Carr and Roland Britt, bartenders at the House of Stewart, Hammond, Indiana, that Petitioner had consumed eight to ten drinks of Canadian Club (bourbon whiskey) and water over a period of three and one-half hours (Tr. pp. 51-57), testimony of Clare E. Herbert that she saw Petitioner's automobile cross the center line and strike the decedent's car head-on, and then bounce back and hit her car (Tr. pp. 57-67), testimony of Richard Keith that Petitioner swerved to the left center of the road and hit the decedent's auto (Tr. pp. 67-77), and the testimony of Charles Powers

that the Petitioner was driving south in the middle of the north-bound lanes of the road when the accident occurred (Tr. pp. 77-82).

Petitioner appealed his conviction to the Court of Appeals of Indiana, alleging as error the admission of the Breatholyzer test into evidence and the insufficiency of the evidence to convict. The Court of Appeals affirmed the conviction, ruling that the State had failed to lay the proper foundation for admission of the Breatholyzer test into evidence, but that the testimony as to the quantity of liquor consumed by the Petitioner and the erratic manner of his driving were sufficient to sustain his conviction.

## SUMMARY OF ARGUMENT

The decision of the Court of Appeals of Indiana that "Independent testimony regarding

the amount of intoxicants consumed and the erratic driving culminating in the death of another was sufficient to prove the essential elements of the offense charged," did not deprive Petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States because:

1. Proof of intoxication was not necessary to conviction of the offense with which Petitioner was charged.

2. There was uncontradicted evidence that Petitioner had drunk eight to ten drinks of bourbon and water during a three-and-a-half-hour period prior to the accident.

3. There was uncontradicted evidence of Petitioner's erratic driving immediately prior to the accident.

4. The trial court could draw on its personal knowledge and experience to estimate the alcoholic content of the drinks Petitioner had had.

5. The trial court observed Petitioner at the trial and could estimate his weight and so calculate the amount of alcohol necessary to impair his faculties sufficiently to cause the death complained of.

## ARGUMENT

THE DECISION OF THE COURT OF APPEALS OF INDIANA THAT "INDEPENDENT TESTIMONY REGARDING THE AMOUNT OF INTOXICANTS CONSUMED AND THE ERRATIC DRIVING CULMINATING IN THE DEATH OF ANOTHER WAS SUFFICIENT TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE CHARGED," DID NOT DEPRIVE PETITIONER OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

I.

Petitioner argues that there is a failure of evidence of the question of intox-

ication and points out the testimony of Norma Carr, the bartender, and Captain Mitchell of the Hammond Fire Department that Petitioner was not intoxicated. However, neither of these witnesses nor any other witness testified that Petitioner was not under the influence of intoxicants. His intoxication was not an issue in the case. Being under the influence of intoxicants is not the same as being intoxicated. Petitioner cites IC 9-4-4.5-2 as authority for the proposition that intoxication is synonymous with "under the influence". However, he overlooks the words "for the purposes of this chapter[9-4-4.5-1——9-4-4.5-6]" in IC 9-4-4.5-2(a), which strictly limits the application of the definition and makes it inapplicable to IC 9-4-1-54, the section under which Petitioner was tried and con-

victed.

In Klaser v. State, (1929), 89 Ind.App. 561, 166 N.E. 21, the Appellate Court of Indiana construed a similar act to the one in question as follows:

> "The offense defined by the statute is not the operation of a motor vehicle by one who is drunk or intoxicated, but 'while under the influence of intoxicating liquor.' It is evident that in the enactment of the statute the lawmakers intended to relieve the state from making proof that the offender was drunk, in the meaning of that word as commonly used."

In Shorter v. State, (1954) 234 Ind. 1, 122 N.E.2d 847, the Supreme Court of Indiana, in construing the statute under which Petitioner was tried and convicted, quoted the above language from Klaser v. State with approval and said further:

> "It is not necessary for a driver to be drunk in order to violate the statute making it unlawful

> for a person to operate a motor vehicle upon a public highway while 'under the influence of intoxicating liquor'; nor is it necessary to prove any specific degree of intoxication, but in each case where a person is charged with violation of the provisions of the act, the question as to whether the defendant was 'under the influence of intoxicating liquor' is one of fact to be determined by the court or jury from all the circumstances of the case."

The Court further stated:

> "'Under the influence of intoxicating liquor' are words in common use — they are not words of technical nature— and are well understood by the laity, who know they refer to the impaired condition of thought and action, and the loss of normal control of one's faculties to a marked degree, caused by drinking intoxicating liquors." (See 122 N.E.2d 849)

Petitioner also argues that the trial judge would have had to infer that the drinks Petitioner had were of a certain size and alcoholic percentage and to infer that Petitioner's physical make-up would result in intoxication. Again we repeat, it was not

necessary for Petitioner to be intoxicated to be under the influence of intoxicating liquor. The size of alcoholic drinks is sufficiently standardized that the judge, like a juror, could draw on his own knowlege and experience to know of what they consisted. The Petitioner was before him and he could judge his approximate weight, age, and other physical characteristics that would determine the effect a given amount of alcohol would have.

It is to be noted in the case before the court that, although two witnesses testified that Petitioner was not drunk, no witness testified that he was not under the influence of intoxicating liquor. The latter condition may be fairly inferred from that large quantity in liquor he had consumed plus the manner of his driving.

In Watts v. State of Indiana, (1949) 338 U.S. 49, 93 L.Ed. 1801, 69 S.Ct. 1347 This comment appears:

> "In the application of so embracing a constitutional concept as 'due process,' it would be idle to expect at all times unanimity of views. Nevertheless, in all the cases that have come here during the last decade from the courts of the various States in which it was claimed that the admission of coerced confessions vitiated convictions for murder, there has been complete agreement that any conflict in testimony as to what actually led to a contested confession is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication. Therefore only those elements of the events involved that are unquestioned in the State's version of what happened are relevant to the constitutional issue here.* * *

While we are not concerned here with conflicting evidence concerning the voluntariness of a confession, but with the sufficiency of the evidence to convict, the above doctrine is applicable. The Court of Appeals of Indiana,

sustained by the Supreme Court of Indiana, has determined that the evidence of Petitioner's being under the influence of intoxicating liquor at the time he killed the decedent was sufficient without the evidence of the Breatholyzer test and, although Petitioner contends there was a conflict in the evidence, he should not expect this court to resolve that conflict. Of course, as we have shown above, there is no conflict, for evidence that Petitioner was not intoxicated does not conflict with evidence that he was under the influence of intoxicants.

Petitioner argues that evidence of the strong odor of paint fumes from his car and the hard rain, creating dangerous road conditions, suggest the possibility that "the cause of the accident could have been something other than intoxication". That possibility was resolved against Petitioner by

the trial court and is not now subject to review.

Petitioner says, "In Klebs, the Court has apparently concluded that Witnesses Carr and Mitchell were disbelieved by the trial judge." That is not the case. On the authority of Shorter v. State, supra, the trial court could have accepted the testimony that Petitioner was not intoxicated, but believed from the uncontradicted evidence of the amount of liquor Petitioner had consumed and his erratic driving that he was under the influence of intoxicating liquor.

## CONCLUSION

For the foregoing reasons it is respectfully submitted the petition for a writ of certiorari should be denied.

Respectfully submitted,

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